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No. 89-826

Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

**FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California Corporation,**

Petitioner, —

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari To The
Court of Appeal Of The State of California,
Second Appellate District, Division Seven

**AMICUS CURIAE BRIEF OF JOHN K. VAN DE KAMP,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
IN OPPOSITION**

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INTEREST OF AMICUS CURIAE

Amicus respectfully file this brief in support of respondent County of Los Angeles pursuant to rule 37.5 of the rules of the Supreme Court of the United States.

The issues presented by this case are of fundamental importance to the State of California. A decision holding that the flood plain safety measures enforced by respondent herein have violated the United States Constitution would seriously impair the ability of the State and its political subdivisions to carry out their diverse police power responsibilities. Adoption of petitioner's radical reformation of takings jurisprudence would cripple amicus' ability to perform regulatory functions upon which its citizens' health, safety and welfare quite literally depend.

STATEMENT OF THE CASE

Amicus adopts respondent's Statement of the Case.

SUMMARY OF ARGUMENT

1. Facial challenges to an alleged regulatory taking may be decided on demurrer without a "factual, evidentiary inquiry" based solely upon the pleadings and judicially noticed facts. (*Agin's v. City of Tiburon*, 447 U.S. 255 (1980).) Neither *Nollan* nor *First English* changes that standard.

2. The taking of judicial notice of facts for the first time on appeal does not raise due process concerns where they involve matters of common knowledge such as statutes and local ordinances. Furthermore, to the extent judicial notice of certain matters is permissible under local law, this Court is bound by that determination. Under California law, an appellate court can take judicial notice even though the facts were not presented to the trial court.

3. The Court of Appeal in addressing the takings challenge to the interim flood ordinance enacted by respondent correctly interpreted this Court's standards for determining when a regulation amounts to a taking of property.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE COURT OF APPEAL DID NOT CONTRAVENE THIS COURT'S REMAND ORDER OR VIOLATE DUE PROCESS IN DETERMINING THAT PETITIONER'S COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR AN UNCONSTITUTIONAL TAKING

Contrary to petitioner's claim, this Court did not order that there be a "factual, evidentiary inquiry" or trial to determine whether a taking occurred. Rather, this Court limited its decision solely to the remedies issue, namely, whether the Fifth Amendment requires

compensation for a regulatory taking. Indeed, this Court specifically recognized:

We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the County might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the state's authority to enact safety regulations. [Citations omitted.] These questions, of course, remain open for decision on the remand we direct today. (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 (1987).)

The circumscribed nature of this Court's holding was, as the Court of Appeal observed, underscored by Justice Stevens in his dissenting opinion and was not "controverted in any way by the majority opinion." (Pet. for Writ of Certiorari, Appendix A, p. A-9; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 325-328 (1987).)

Thus, it cannot be said that this Court directed or required the Court of Appeal on remand to resolve the takings issue in any particular manner.

Furthermore, the Court of Appeal's decision to sustain the trial court's judgment on the alternative ground that the complaint failed to allege facts sufficient to state a cause of action, was wholly consistent with California rules of appellate review

which provide that a correct ruling by the trial court must be affirmed on appeal even if it is based on erroneous reasoning if there is an alternative rationale which will support the judgment. (*Keenan v. Dean*, 134 Cal.App.3d 189 (1956).) To the extent petitioner objects to the Court of Appeal's application of state law, petitioner's claim does not raise a federal question appropriate for review by this Court. (See *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 461 (1907).)

Finally, there is no merit to petitioner's assertion that judicial notice of the disputed interim ordinance by the Court of Appeal violates due process. This Court has long held that courts may take judicial notice of "matter of common knowledge" including state statutes, city charters and local ordinances. (See *Ohio Bell Tel. Co. v. Pub. Util. Commn.* 301 U.S. 292, 301; *Newcomb v. Brennan*, 538 F.2d 825, 829 (7th Cir. 1977).) To the extent judicial notice of certain matters is permitted under local law, this Court is "bound" by that determination. (*Renaud v. Abbott*, 116 U.S. 285-286 (1985).)

Under California law, courts may take judicial notice of all regulations or enactments issued by any public entity (Cal. Evid. Code, § 452(b)), and a reviewing court may take judicial notice of any matter that could have been judicially noticed by the trial court even though they were not presented to the trial court as long as the reviewing court affords each party

reasonable opportunity to present to the court information relevant to the propriety of taking judicial notice. (Cal. Evid. Code, § 455(a), 459(c); *People v. Terry*, 38 Cal.App.3d 432, 439 (1974).)

Furthermore, it is apparent that this Court saw no due process problems with the Court of Appeal taking judicial notice of the interim ordinance. Justice Stevens in his dissent in this case, without objection from any other Justice, similarly took judicial notice of the interim flood ordinance. (*First English, supra*, 482 U.S. at 326, fn. 6.)

Accordingly, it was entirely proper for the Court of Appeal to take judicial notice of the disputed interim ordinance and related provisions. (Pet. (Opinion) p. A-19; also see Pet. (Appendix D).)

Furthermore, the Court of Appeal's decision directly mirrored this Court's resolution of the identical issue in *Agins v. City of Tiburon*, 477 U.S. 255 (1980). In *Agins*, both the California Supreme Court (see *Agins v. City of Tiburon*, 4 Cal.3d 266 (1979)) and this Court upheld an order sustaining a demurrer to an inverse condemnation complaint despite an allegation that the zoning ordinance would "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever. . ." (*Agins, supra*, 447 U.S. at 259, fn. 6.) The California high court, taking judicial notice of the relevant ordinances, concluded that the enactment on its face did not deprive plaintiffs of all reasonable use since it allowed them to build between one to five

residential units on their land. (*Agins, supra*, 24 Cal.3d 277.) This Court in affirming the judgment, rejected the assertion that it was improper for the California Supreme Court to take judicial notice of the zoning ordinances.

This Court reasoned that under California law, judicial notice of local ordinances was permissible and that the State Supreme Court "merely rejected allegations inconsistent with the explicit terms of the ordinance under review." (*Agins, supra*, 477 U.S. at 259, fn. 6.)

Here, as in *Agins*, the sole purpose of taking judicial notice of the disputed ordinances was to "compare the express terms of the [regulations] with the factual allegations in the complaint." (*Agins, supra*, 477 U.S. at 259, fn. 6; Pet. (Opinion), p. A-19.) On that basis, the Court of Appeal, properly sustained the judgment of the trial court.

Neither of the two cases cited by petitioner are applicable to the circumstances here or compel reversal of the judgment below. (E.g., *Ohio Bell Tel. Co. v. Pub. Util. Commn.*, 301 U.S. 292 (1937); *Garner v. Louisiana*, 368 U.S. 157 (1961). *Garner* and *Ohio Bell* merely stand for the self evident proposition that appellate courts may not judicially notice facts which are properly in dispute and the province of the trier of fact. Furthermore, both cases are clearly distinguishable on other grounds as well. (See Respondent's Brief in Opposition, pp. 18-19.)

II

THE OPINION OF THE COURT OF APPEAL
CORRECTLY INTERPRETED AND APPLIED
THE DECISIONS OF THIS COURT RELATING
TO THE STANDARD OF REVIEW FOR
DETERMINING WHETHER A REGULATORY
TAKING HAS OCCURRED

A. **The Court of Appeal Did
Not Ignore This Court's
Guidance for Remand**

Petitioner argues that the Court of Appeal in concluding that no taking has occurred, relied solely on the public safety justification for the enactment and failed to adequately address whether the ordinance provided petitioner economically viable use of its property. Thus, petitioner asserts that the Court of Appeal's conclusion cannot be reconciled with this Court's view that the "purpose of the Just Compensation Clause . . . is to require government to compensate for property taken in the course of 'otherwise proper' interferences." (Pet., p. 13.)

Contrary to petitioner's claim, the Court of Appeal did not ignore this Court's pronouncements, it simply concluded after a comparison of the terms of the flood safety measure and the allegations of the complaint that petitioner was not entitled to compensation because the interim ordinance did not work a taking of property. (Pet. (Opinion), p. A28.)

**B. The Court of Appeal Properly Interpreted
And Applied the Public Safety Exemption
In the Context of Takings Analysis**

Petitioner also contends the court below misapplied the "public safety" or "nuisance" exception line of cases exemplified by this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1897) and more recently in *Keystone Bituminous Coal Ass'n. v. De Benedictis*, 480 U.S. 470 (1986).

Specifically, petitioner asserts that the "extent of the use prohibition approved the Court of Appeal in this case goes beyond anything this court has ever countenanced" (Pet., p. 18) and accuses the Court of Appeal of applying the public safety exception in a manner which would "preclude all reasonable use of First Church's property without compensation." (Pet., p. 18.) The fallacy of this argument is, as respondent aptedly observed, that it rests on a "patently false premise." (Respondent's Brief in Opposition, p. 21.) The Court of Appeal specifically found, contrary to petitioner's contention, that the interim flood safety ordinance did not deprive First English of "all use" of its property. (Pet. (Opinion), pp. A18, A24.)

Furthermore, there is nothing in the Court of Appeal's opinion which even remotely suggests that the court misconstrued or misapplied the public safety or "nuisance" exception.

On the contrary, the Court of Appeal recognized, as did this Court in *Mugler* and *Keystone*, that a

"prohibition simply upon the use of property for purposes that are declare by valid legislation, to be injurious to the . . . safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." (*Mugler, supra*, 123 U.S. 668-669; Pet. (Opinion), p. A11.) This Court, in reaffirming *Mugler*, observed that the "special status of this type of state action can also be understood on the simply theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has no 'taken' anything when it asserts its power to enjoin the nuisance like activity." (*Keystone, supra*, 480 U.S. at 491, fn. 20.)

In the present case, this Court has acknowledged that even assuming the ordinance in question denied petitioner all use of the property, it may still be "insulated as part of the state's authority to enact safety regulations." (*First English, supra*, 482 U.S. at 313.)

The decision of the Court of Appeal below was entirely consistent with these principles. (Pet. (Opinion), pp. A16-A24.)

In any event, the Court of Appeal in rejecting the takings claim did not rely solely on the public safety exception. Here as in *Keystone, supra*, 480 U.S. at 492-493, the Court of Appeal found that the safety ordinance besides being insulated as part of the State's authority to enact safety regulations, did not deprive petitioner of all use of its property. (Pet. (Opinion), pp. A18, fn. 10, A25.)

Petitioner seeks to distinguish *Mugler* and the present case on the ground that the former involved a specific use of property which this Court held could be prevented because it constituted a nuisance. (Pet., p. 19.) In fact, there is little difference between the application of the public safety exception in *Mugler* and here. Here as in *Mugler*, the safety ordinance under review only prohibited, temporarily, a specific hazardous use of property, namely, the reconstruction of buildings in a flood prone area. (Pet. (Opinion), p. A18.)

C. The Court of Appeal Applied the Proper Test in Rejecting Petitioner's Facial Challenge to the Interim Safety Ordinance

Petitioner asserts that the Court of Appeal "ignored" this Court's standards for determining whether a regulation effects a taking of property. (Pet., pp. 16, 18.) This contention is as respondent noted "patently frivolous." (Respondent's Brief in Opposition, p. 24.)

Because petitioner's taking claim in the present case arose in the context of a "facial" challenge of the ordinance, the sole question was whether the "mere enactment" of the flood safety provision constitutes a taking. (*Keystone, supra*, 480 U.S. at 495.) The test to be applied in considering a facial challenge is whether the ordinance fails to substantially advance legitimate state interest or denies petitioner economically viable use of his land. (*Agins, supra*, 447 U.S. at 260.) The Court of Appeal here in explicitly applying the *Agins* formulation, determined that the petition failed to state

a cause of action for an unconstitutional taking precisely because the interim ordinance in question "substantially advanced the preeminent state interest in public safety and did not deny petitioner all use of its property." (Pet. (Opinion), p. A2, A18.)

Petitioner, although acknowledging that the court below "mentions" the *Agin*s test, asserts that there is no way, without a trial, that any court can "determine whether the County's regulation permitted 'economically viable use or not.'" (Pet., p. 12.) Petitioner overlooks the fact that this Court in *Agin*s applied the two-pronged *Agin*s test based solely upon the pleadings and judicially notice provisions of the disputed ordinance in disposing of a facial takings challenge. (*Agin*s, 447 U.S. at 259, fn. 8.)

Lastly, the Court of Appeal did not err in failing to apply the "reasonable investment backed expectations" test. (See Pet., p. 16.) First, the test applies only where there is an "as applied" challenge to an alleged regulatory taking. (*Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 294-296 (1981). In contrast, this case involved a facial attack on the ordinance under review. Secondly, petitioner failed to allege any fact which would demonstrate how the interim ordinance could have interfered with any reasonable investment back expectation interest. Indeed, as Justice Stevens points out in his dissent in this case, in light of the tragic flood and loss of life that precipitated the safety regulation "it is hard to

understand how [petitioner] ever expected to rebuild on Lutherglen." (*First English*, 482 U.S. at 327-328.)

D. The Court of Appeal Did Not Misconstrue or Misinterpret Nollan

Petitioner also argues that the Court of Appeal failed to apply the "heightened standard of judicial review" this Court adopted in *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825 (1987) for determining whether a land use regulation substantially advances a legitimate state interest. (Pet., pp. 25-28.)

The argument fails for two reasons. This Court in *Nollan* made clear that heightened scrutiny was intended to apply only where the "actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective." (*Nollan, supra*, 483 U.S. at 841.)

Here, unlike *Nollan*, the petitioner did not allege that the limitation imposed was motivated by a desire to acquire Lutherglen at a lower price. (Pet. (Opinion), p. A25.) On the contrary, the flood ordinance was clearly a legitimate safety regulation and not intended as a means to circumvent compensating petitioner for the loss of property; petitioner concedes as much.

Justice Stevens points out in his dissent, the "legitimacy of the County's interest in the enactment of [the flood ordinance] is apparent from the face of the

ordinance and has never been challenged." (*First English, supra*, 482 U.S. at 326-327.)

Furthermore, the conveyance of a property interest present in *Nollan* is not apparent here. Thus, application of the heightened scrutiny test in this case is neither appropriate nor compelled by *Nollan*.

Secondly, the Court of Appeal, in fact, recognized that *Nollan* reflected a "refinement" of the *Agins* test and expressly held that under *Nollan* "there can be no serious contention" that the safety ordinance failed to substantially advance the precise legitimate state interest. (Pet. (Opinion), pp. A16, A25.)

Petitioner also claims that the Court of Appeal ignored this Court's language in *Nollan* that property owners have a right to build on their own property subject to reasonable regulation. (Pet., p. 24.) This argument, as with petitioner's other claims, is without merit.

The crux of petitioner's contention is that the right to build is an identifiable and separable property interest for takings purposes and thus the prohibition of new development imposed by the County's flood measure deprived it of all economically viable use of its land. There is nothing in *Nollan* or any other decision of this court which compels such a result. To the contrary, the right to build is merely one strand in the bundle of property rights. Where an owner possesses a full bundle of rights, the destruction of one strand is not a taking because the aggregate must be viewed in

its entirety. (*Andrus v. Allard*, 444 U.S. 57, 65-66 (1979).)

As this Court explained in *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-131 (1978):

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole. . . .

Thus, here as in *Andrus* and *Penn. Central*, the flood ordinance does not deprive petitioner of all economically viable use of its land, it merely removes one strand from the Church's bundle of rights. Petitioner still retains the ability to use the property in any number of viable ways which are reflected in the Court of Appeal's decision below. (Pet. (Opinion), p. A18-A24.)

Lastly, *Nollan* does not provide, as petitioner contends, that one has a constitutional right to build on his property if to do so would create a potential risk of harm to the public. (See *Mugler, supra.*) If the rule were otherwise, as respondent observed, "all building and safety codes would be invalid." (Respondent's Brief in Opposition p. 27.) Accordingly, the Court of

Appeal in this case did not misconstrue or misapply this Court's decision in *Nollan*.

In short, petitioner raises no issues which demand this Court's attention. The sole question is whether the Court of Appeal below faithfully followed this Court's settle precedents in determining whether the ordinance under review amounted to a taking of property. As shown, the court acted properly. Therefore, review by this Court is neither necessary or appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: January 4, 1990

Respectfully submitted,

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DECLARATION OF SERVICE

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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles. I am over the age of 18 years and not a party to the within action; my business address is 3580 Wilshire Boulevard, Los Angeles, California.

On January 5, 1990, I served the within Amicus Curiae Brief of John K. Van de Kamp, Attorney General of the State of California in Opposition on all parties by placing three true copies thereof enclosed in sealed envelopes, with postage thereon fully prepaid, in the United State Post Office mail box at Los Angeles, California, addressed as follows:

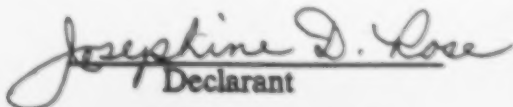
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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 1990, at Los Angeles, California.


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